LIBRARY
SUPREME COURT, U. S.

FILED
MAY 22 1971
E. ROBERT SEAVER, CLE

In the Supreme Court of the United States

1621

DONALD BARGER, *Petitioner*

vs.

STATE OF WASHINGTON, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

C. J. Rabideau,
Franklin County Prosecuting Attorney,
Counsel for Respondent,
State of Washington

In the Supreme Court of the United States

DONALD BARGER, *Petitioner*

vs.

STATE OF WASHINGTON, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

C. J. Rabideau,
Franklin County Prosecuting Attorney,
Counsel for Respondent,
State of Washington

printGraphics, Inc. Pasco, Wash

INDEX

Page

Statement of Facts 1

Argument 6

Conslusion 10

CITATIONS

CASES:

Ashe vs. Swenson, 397 U.S. 436, 25 L.ed 2d 496, 90 S Ct 1189 8

State vs. Hite, 3 Wash. App. 9 9

Waller vs. Florida, 397 U.S. 387, 25 L.ed 2d 435, 90 S Ct 1184 7

STATUTES:

R.C.W. 9.01.040 4

R.C.W. 9.54.020 4

R.C.W. 9.79.100 3

R.C.W. 10.25.010 6

R.C.W. 10.25.020 6

R.C.W. 10.25.030 6

R.C.W. 10.25.060 7

R.C.W. 13.04.010 5

R.C.W. 13.04.170 5

R.C.W. 36.27.010 2

In the Supreme Court of the United States

DONALD BARGER, *Petitioner*

vs.

STATE OF WASHINGTON, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The State of Washington prays that the Court deny the Petition for Writ of Certiorari to reveiw the orders of the Superior Court, Appellate Court, and the Supreme Court of the State of Washington denying the dismissal of a criminal Information, Franklin County Criminal No. 2729, now pending against petitioner Donald Barger.

STATEMENT OF FACTS

Franklin County, State of Washington, is separated from Benton County, State of Washington, by the Columbia River. Crossing the Columbia River along this boundary requires more than wading or fording; the river being approximately one-quarter to one-half

mile wide for a distance of some forty miles. Each county has its own elected Prosecuting Attorney. In the State of Washington a Prosecuting Attorney has jurisdiction only within the boundaries of the county wherein he is elected. Revised Code of Washington (hereinafter referred to as R.C.W.) 36.27.010 states as follows:

> "Eligibility to office. No person shall be eligible to the office of prosecuting attorney in any county of this state, unless he is a qualified elector therein, and has been admitted as an attorney and counselor of the Courts of this state."

Prior to July 30, 1970, petitioner Donald Barger resided in the City of Richland, County of Benton, some ten miles distant by road and highway bridge from the City of Pasco, County of Franklin. Petitioner was then, and is now, a caseworker for the Washington State Department of Public Assistance, social-working out of the Pasco office. In years past, petitioner became acquainted with a minor, to-wit: Eugene C. Priest whose birthday is alleged to be July 19, 1953. In fact petitioner was said minor's case worker in the City of Port Angeles, County of Clallam, on Puget Sound some 300 miles from Pasco prior to moving to this area about two years ago. Somehow Eugene C. Priest discovered that petitioner lived in Richland. In the early summer of 1970, petitioner made living accommodations available to Eugene C. Priest, then age 17, at petitioner's Richland residence. Both resided together at the Richland residence until sometime

in late July 1970 when petitioner and said minor moved to the City of Pasco and took up joint residence again. In mid August, 1970, petitioner was arrested and charged by the Benton County Prosecuting Attorney with the crime of Sodomy, alleging that the criminal act occurred July 17, 1970 in Benton County, State of Washington. Sodomy is defined in the Revised Code of Washington as follows:

> "9.79.100 Sodomy-Penalties. Every person who shall carnally know in any manner any animal or bird; or who shall carnally know any male or female person by the anus or with the mouth or tongue; or who shall voluntarily submit to such carnal knowledge; or who shall attempt sexual intercourse with a dead body, shall be guilty of sodomy and shall be punished as follows:
>
> "(1) When such act is committed upon a child under the age of fifteen years, by imprisonment in the state penitentiary for not more than twenty years.
>
> "(a) In all other cases by imprisonment in the state penitentiary for not more than ten years."

A jury trial ensued and petitioner was acquitted. That trial took place November 4, 1970. The issue in that trial was whether or not petitioner had committed an act of oral Sodomy upon the minor aforementioned.

Earlier, to-wit: September 4, 1970, three weeks after the Benton County Prosecuting Attorney charged petitioner with the crime of sodomy, the Franklin County Prosecuting Attorney charged petitioner, by

Information, with two crimes:

> "The the said Donald Barger in the County of Franklin, State of Washington, on or about the period from the 30th day of July to the 12th day of August, 1970, then a d there wilfully, unlawfully and feloniously
>
> COUNT I
>
> did harbor, conceal or aid a minor, who had committed a felony; to-wit: the crime under RCW 9.54.020 of unlawful taking of an automobile without the permission of the owner, with the intent that said minor may avoid or escape from arrest, trial, conviction, or punishment, having knowledge that said minor has committed a felony as aforesaid, or is liable to arrest.
>
> COUNT II
>
> did contribute to the delinquency of a minor by supplying liquor to the minor mentioned in Count I . . ."

The criminal code provisions pertinent to Count I are as follows

> "RCW 9.01.040 Accessory defined. Every person not standing in the relation of husband or wife, brother or sister, parent or grandparent, child or grandchild, to the offender, who after the commission of a felony shall harbor, conceal or aid such offender with intent that he may avoid or escape from arrest, trial convicition or punishment, having knowledge that such offender has committed a felony or is liable to arrest, is an accessory to the felony."
>
> "RCW 9.54.020 Taking Motor Vehicle without permission. Every person who shall without the

permission of the owner or person entitled to the possession thereof intentionally take or drive away any automobile or motor vehicle, whether propelled by steam, electricity or internal combustion engine, the property of another, shall be deemed guilty of a felony, and every person voluntarily riding in or upon said automobile or motor vehicle with knowledge of the fact that the same was unlawfully taken shall be equally guilty with the person taking or driving said automobile or motor vehicle and shall be deemed guilty of a felony."

The Washington code provision germane to Count II is as follows:

"R.C.W. 13.04.170 Contributing to delinquency—Penalty—Bond. In all cases where any child is dependent or delinquent under the terms of this title, the parent or parents, legal guardian, or person having custody of such child, or any other person, who, by any act or omission, encourages, causes or contributes to the dependency of delinquency of such child shall be guilty of a misdemeanor, and upon convicition thereof, be punished by fine not exceeding one thousand dollars, or imprisonment in the county jail for not more than one year, or by both such fine or imprisonment, . . ."

"R.C.W. 13.04.010 Juvenile court law-Dependent and delinquent children defined-Wards of state . . . "The words 'delinquent child' mean any child under the age of eighteen years who violates any law of this state, or any ordinance of any town, city, or county of this state defining a crime or who has violated any federal law or law of another state defining a crime, and whose case has been referred to the juvenile court by any jurisdiction whatsoever."

Respondent understands that the testimony in the

Benton County Sodomy trial included reference to the fact petitioner furnished liquor to Eugene C. Priest in Franklin County. However, such reference did not relate to an element of the crime of sodomy, or to the time the sodomy act was alleged.

ARGUMENT

The acts alleged in Benton County took place on or about July 17, 1970. The acts alleged in Franklin County, contained in Counts I and II of the Franklin County Information occurred between July 30 and August 12 1970. A time gap of two weeks exists between the Benton County charge and the Franklin County charges.

The Prosecuting Attorney is guided by the following venue statutes:

> "RCW 10.25.010 Criminal actions—Where commenced. Except as otherwise specially provided by statute, all criminal actions shall be commenced and tried in the county where the offense was committed."

> "RCW 10.25.020 Offenses committed in two or more counties. When a public offense has been committed partly in one county and partly in another, or the act or effects constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county."

> "RCW 10.25.030 Offenses committed on county boundaries. Offenses committed on the boundary line of two counties, or within one hundred rods of the dividing line between them, may be alleged in

the indictment or information to have been committed in either of them, and may be prosecuted and punished in either county."

"R.C.W. 10.25.060 Accessory after the fact. An accessory after the fact to a felony may be tried either in the county in which he shall have become an accessory, or in the county in which the felony shall have been committed."

Petitioner has not suggested that either of the crimes alleged in the Franklin County Information took place in Benton County, or that the Benton County Prosecuting Attorney had jurisdiction to charge in Benton County for crimes which occurred in Franklin County. This is not a county line situation as provided for in RCW 10.25.020 and RCW 10.25.030, *supra.* It was incumbent upon the Franklin County Prosecuting Attorney to press charges in Franklin County since the facts alleged in the Information, in cause No. 2729, relate to the elements of crimes which happened only in Franklin County. The venue statutes above cited require this result. Since the Benton County Prosecuting Attorney is not an elector in Franklin County, he has no jurisdiction to act in Franklin County. R.C.W. 36.27.010, *supra.*

Waller vs. Florida, 397 U.S. 387, 25 L.ed 2d 435, 90 S CT 1184, relates to a set of contemporaneous circumstances wherein *Waller* was charged in both the municipal court and the state court in the same county. This court was of the opinion that it would be double jeopardy in the event the elements of the county ordinance

violations were or could have been factually elements of the State Criminal Code violations subsequently charged. The cause was remanded to make this determination. This court decided that *Waller* should have been tried once for all charges arising out of the same factual situation in the same jurisdiction. The court further determined that the county and city involved were within the same jurisdicition. On our facts, we have a different situation: Two separate counties, which are different jurisdictions under the aforementioned venue statutes.

Petitioner argues the efficacy of *Ashe vs. Swenson,* 397 U.S. 436, 25 L.ed 2d 469, 90 S CT 1189. That case is not apposite. No one suggests that petitioner is being tried again for the same act. In Benton County he was charged with Sodomy on July 17, 1970. He is not now and has never been charged with Sodomy in Franklin County at any time. To this date, no offer of proof has been made by petitioner that the elements of Counts I and II herein are necessarily or remotely connected with the Sodomy charge in Benton County. No authority has been cited by petitioner which would bar respondent from proceeding against him in Franklin County for the sole reason that certain testimony adduced in the Benton County trial related to facts which subsequently occurred in Franklin County.

Petitioner misapplies the rule of *Ashe vs. Swenson, supra.* The collateral estoppel argument fails for the reason that the only ultimate fact litigated in Benton

County related to whether or not Donald Barger, petitioner herein, committed the act of Sodomy as charged. Whether or not Donald Barger furnished alcohol to the minor child involved was not an ultimate fact to be proven in the Benton County cause. In *State vs. Hite,* 3 Wash. App. 9, it was held that in order to support a plea of double jeopardy, a defendant must show jurisdiction in the court in the earlier trial, and that the two trials would involve defenses identical in law and in fact. The case held further that collateral estoppel is applicable in criminal cases to prevent the State from proving a criminal charge by asserting facts necessarily determined against it in an earlier unsuccessful trial of the same defendant on different charge. Respondent does not question the result in the *Hite* case *supra,* the facts therein are related to incidents occurring on the same date or dates and times. Petitioner has failed to show that the two trials would involve offenses identical in law and fact. In addition, petitioner has failed to prove that the ultimate facts required in the Franklin County case were determined against respondent in the earlier unsuccessful Benton County trial.

The decisions of the trial court, Appellate Court, and Supreme Court of the State of Washington, are correct along settled principles. They are consistent with *Ashe vs. Swenson, supra,* and *Waller vs. Florida, supra.*

CONCLUSION

Respondent has conclusively established that petitioner will not be tried for crimes in Franklin County which are based on ultimate facts found against the State of Washington in the Benton County trial. Petitioner has not been charged heretofore with the crimes contained in Counts I and II of the Franklin County Information upon the dates and times alleged. It is quite clear that the doctrines of double jeopardy and colleteral estoppel do not apply.

Respondent has established that the Franklin County Prosecuting Attorney was not vested with jurisdiction to charge petitioner with the crime of Sodomy, which allegedly occurred July 17, 1970, for the reason that it happened in another county. And by the same token, the Benton County Prosecuting Attorney was without jurisdiction to charge petitioner with those crimes alleged in Franklin County between July 30 and August 12, 1970. The Court should deny the petition for Write of Certiorari.

Respectfully submitted,

C. J. Rabideau, Franklin
County Prosecuting Attorney,
Counsel for Respondent,
State of Washington